No. 93-423

In the Supreme Court of the United States

OCTOBER TERM, 1993

STAVROS KATSIS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

CHARLES E. PAZAR
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether an individual who has been found deportable by a final order of the Board of Immigration Appeals remains eligible to file a motion to reopen deportation proceedings to seek relief from deportation under 8 U.S.C. 1182(c), even though that relief is available only to permanent resident aliens and an individual found deportable is no longer a permanent resident alien.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-23a) is reported at 997 F.2d 1067. The opinion of the Board of Immigration Appeals (Pet. App. 24a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1993. A petition for rehearing was denied on August 9, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on September 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Greece who was admitted to this country as a lawful permanent resident in 1983. In 1988, he was convicted of a controlled substance offense, for which he served a prison term of about two years. The Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner in January 1989, contending that the conviction rendered him deportable under 8 U.S.C. 1251(a)(11) (1988).[1] At his deportation hearing, petitioner conceded that he was deportable, but sought discretionary relief from deportation under 8 U.S.C. 1182(c).[2] The immigration judge concluded that petitioner was deportable and that he was eligible for relief under Section 1182(c),[3] but

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[1] The grounds for deportation were reorganized by Section 602(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5077, and the provision cited in the text now appears as 8 U.S.C. 1251(a)(2)(B) (Supp. IV 1992). The amendment does not apply to this case because the 1990 Act states that the amendments set forth in Section 602 "shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991." § 602(d), 104 Stat. 5082.

[2] That provision was amended by Section 307(b) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1754, but the revisions have no effect on this case. For convenience, references to 8 U.S.C. 1182(c) are to the currently codified version of the provision.

[3] Although the statute on its face authorizes the Attorney General only to admit aliens returning to a lawful domicile in this country, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See, *e.g.*, *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (BIA 1976); see also *id.* at 32 (Appleman, concurring)

declined to grant relief because of the seriousness of petitioner's offense. Petitioner appealed to the Board of Immigration Appeals, challenging the denial of relief under Section 1182(c), but the Board affirmed. The court of appeals denied a petition for review in an unpublished opinion dated July 17, 1992. See Pet. App. 5a-6a; *Katsis* v. *INS*, 972 F.2d 1331 (3d Cir. 1992) (Table).

2. On August 17, 1992, after the court of appeals denied his petition for review of the order of deportation, petitioner filed a motion to reopen his deportation proceedings before the Board. The Board denied the motion. Pet. App. 24a-27a. It explained that an alien seeking reopening must show his prima facie eligibility for the relief sought, and that relief under Section 1182(c) is limited to lawful permanent residents. Pet. App. 25a. Relying on its decision in *In re Cerna*, Interim Dec. No. 3161 (BIA Oct. 7, 1991), aff'd, *Cerna* v. *INS*, 979 F.2d 212, 213 (11th Cir. 1992) (Table) (per curiam), the Board reasoned that petitioner was not a permanent resident at the time he filed the motion to reopen because the Board's earlier decision had resulted in an administratively final order of deportation that deprived him of permanent resident status. Pet. App. 25a-26a.

3. The court of appeals denied petitioner's petition for review of the Board's denial of his motion to reopen. Pet. App. 3a-23a. The court noted its obligation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the Attorney General's construction of the relevant provisions of the Immigration and Nationality Act (Pet. App. 7a), and then conducted an extensive analysis of the reasonableness of the Board's interpretation (*id.* at 11a-20a). The

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(noting that this interpretation of Section 1182(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

court concluded that the Board's interpretation is "reasonable, and not arbitrary or capricious," because it

> (1) discourages unnecessary litigation and promotes finality; (2) reduces both Board and circuit court exposure to multiple, piecemeal requests for consideration of one kind or another; and (3) reduces the incentive to file meritless petitions for review in the circuit courts, which lessens the burdens on those courts.

Id. at 19a-20a.

ARGUMENT

1. Petitioner argues (Pet. 4-10) that the Board erred in denying his motion to reopen his deportation proceedings on the ground that he was ineligible for the relief he sought at the time he filed the motion to reopen. As this Court has explained, an alien seeking to reopen deportation proceedings must, *inter alia*, make a prima facie showing that he is eligible for the relief he seeks. *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). To be eligible for relief under 8 U.S.C. 1182(c), an alien must, among other things, be a lawful permanent resident alien. Under 8 U.S.C. 1101(a)(20), an alien is "lawfully admitted for permanent residence" if he has "the status of having been lawfully accorded the privilege of residing permanently in the United States * * *, such status not having changed."

Hence, the principal question in this case is whether petitioner's status as a lawful permanent resident alien "changed," for purposes of 8 U.S.C. 1101(a)(20), at the time the Board issued a final order of deportation. In light of the statutory mandate that deportation decisions "shall be final" upon completion of administrative proceedings, see 8 U.S.C. 1252(b) (1988 & Supp. IV 1992);

8 C.F.R. 243.1 ("an order of deportation * * * shall become final upon dismissal of an appeal by the Board"), the Board consistently has held that a permanent resident alien's status changes at that time and that the alien is not thereafter eligible to seek relief that is dependent on permanent resident status. See *In re Cerna*, Interim Dec. No. 3161 (BIA Oct. 7, 1991), aff'd, *Cerna* v. *INS*, 979 F.2d 212, 213 (11th Cir. 1992); see also *Gonzales* v. *INS*, 921 F.2d 236, 238-239 (9th Cir. 1990) (similar analysis before *Cerna*).

The further question presented by this case is, if a permanent resident alien's status is "changed" upon entry of a final order of deportation, whether a motion to reopen is a proper vehicle for reversing that change of status. Because a motion to reopen is, in the Board's view, a request for a new decision based on evidence or arguments not before the original tribunal, the Board has concluded that aliens as to whom it has issued a final order of deportation should not be able to reopen their deportation proceedings to secure relief from deportation based on Section 1182(c). *Cerna*, slip op. 6.[4]

2. Petitioner correctly notes (Pet. 5-6; Pet. Supp. Br. 1-5) that the courts of appeals have reached conflicting results on the question presented by the petition. Like the Third Circuit in this case, the courts of appeals for the Fourth, Fifth, and Eleventh Circuits accept the analysis set forth by the Board in *Cerna*. *Nwolise* v. *INS*, 4 F.3d 306, 310-312 (4th Cir. 1993), petition for cert.

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[4] As the Board concluded in *Cerna*, that rule does permit aliens to file motions to *reconsider* the original decision, because such a motion does not seek a new decision based on new evidence, but instead seeks to convince the tribunal that it erred in resolving the matters placed before it when it originally ruled. See *Cerna*, slip op. 5-6.

pending, No. 93-6427; *Ghassan* v. *INS*, 972 F.2d 631 (5th Cir. 1992), cert. denied, 113 S. Ct. 1412 (1993); *Rivera* v. *INS*, 810 F.2d 540 (5th Cir. 1987); *Jaramillo* v. *INS*, 1 F.3d 1149, 1152-1156 (11th Cir. 1993) (en banc). On the other hand, the Board's analysis has been rejected by the courts of appeals for the First, Seventh, and Ninth Circuits.[5] *Goncalves* v. *INS*, 6 F.3d 830, 832-835 (1st Cir. 1993); *Henry* v. *INS*, No. 91-2252 (7th Cir. Oct. 15, 1993), slip op. 13-23; *Butros* v. *INS*, 990 F.2d 1142, 1144-1146 (9th Cir. 1993) (en banc).[6]

Notwithstanding the conflict in the appellate decisions, we do not believe that the question merits review by the Court at this time. As we explained in our brief in opposition to the certiorari petition in *Ghassan* v. *INS*, cert. denied, 113 S. Ct. 1412 (1993) (No. 92-872),[7] Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5066, directed the Attorney General to promulgate regulations that would delineate more precisely the circumstances under which motions to reopen would be permissible.[8] After extensive internal deliberations, those regulations now have been prepared

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[5] The Second Circuit also has reached a contrary result, *Vargas* v. *INS*, 938 F.2d 358, 360-364 (1991), but that decision (issued before the Board's opinion in *Cerna*) rested on the lack of serious administrative consideration of the question at that time, see *id.* at 361-363. Accordingly, it is not clear that the Second Circuit would adhere to *Vargas* in light of the Board's detailed consideration of the question in *Cerna*.

[6] The decision in *Butros* expressly repudiated the court's earlier decision in *Gonzales* v. *INS*, 921 F.2d 236, 238-239 (9th Cir. 1990). *Butros*, 990 F.2d at 1145.

[7] We have provided counsel for petitioner with a copy of our brief in *Ghassan*.

[8] The Immigration Act of 1990 required issuance of those regulations by the spring of 1991. § 545(d), 104 Stat. 5066.

and are in the final stages of review at the highest levels of the Justice Department. We have been informed that the regulations are expected to be issued in the near future and that they will specifically address the question presented by the certiorari petition in this case.

The forthcoming regulations render review by the Court unnecessary. Each of the courts of appeals that has rejected the government's position has relied heavily on the notion that the analysis of the Board in *Cerna*—that aliens seeking relief under Section 1182(c) cannot file motions to reopen—is inconsistent with the unqualified provision in 8 C.F.R. 3.2 authorizing motions to reopen. See *Goncalves* v. *INS*, 6 F.3d 830, 832-833 (1st Cir. 1993); *Henry* v. *INS*, No. 91-2252 (7th Cir. Oct. 15, 1993), slip op. 21-22; *Butros* v. *INS*, 990 F.2d 1142, 1145 (9th Cir. 1993) (en banc). Accordingly, the forthcoming regulations of the Attorney General expressly addressing the subject of motions to reopen in order to seek discretionary relief under Section 1182(c) will eliminate any basis for future appellate rulings that the Board's disposition of such motions to reopen is inconsistent with the governing regulations. The regulations also will render the current circuit conflict concerning the interpretation of the soon-to-be-superseded regulations of no continuing importance.

In light of these developments, the Solicitor General has decided not to file petitions for a writ of certiorari to review the decisions of the First and Seventh Circuits in *Goncalves* and *Henry* that rejected the Board's position under the existing regulations.[9] Indeed, the First Cir-

[9] The Solicitor General likewise declined to file a petition for a writ of certiorari last summer seeking review of the Ninth Circuit's decision in *Butros*, in light of the prospect (which now is

cuit specifically suggested that the problem be resolved by amending the regulations, in lieu of seeking review in this Court. See *Goncalves*, 6 F.3d at 835-836. Consistent with that approach—and with the Court's denial of certiorari in *Ghassan*—the petition for a writ of certiorari in this case should be denied.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

CHARLES E. PAZAR
Attorney

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soon to be realized) that the statutorily mandated revision of the reopening regulations specifically would address the question presented here).

[10] We also are filing today a brief in opposition to the petition in *Nwolise* v. *INS*, No. 93-6427, which seeks review of the Fourth Circuit's decision sustaining the Board's approach under the current regulations.